SUPREME COURT, U. S.

SEP 23 1957

JOHN F. DAVIS, CLERK

No. 282

In the Supreme Court of the United States

OCTOBER TERM, 1967

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

v.

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

JOHN F. WARD, JR.,
Counsel For Petitioners,
206 Louisiana Avenue,
Baton Rouge, Louisiana.

INDEX

PAGE

Explanatory Statement 1

Comments on Opponents Brief in Opposition 2

Discussion of Decisions subsequent to Jefferson 7

Certificate of Service 16

CASES CITED

Bowman v. County School Board of Charles City County Virginia, et al., No. 10793, 4th Cir. (June 12, 1967) 1, 7

Bradley v. School Board, 382 U.S. 103 (1965) 14

Briggs v. Elliott 132 F.Supp.776 (E.D.S.C. 1955) 5

Davis v. Board of School Commissioners in Mobile County 364 F.2d 896 6

Deal v. Cincinnati Board of Education 369 F.2d 55 (6th Cir., 1966), Petition for Certiorari filed, O.T. 1967, No. 131 12

Hobson v. Hansen and the Board of Education of the District of Columbia, et al, No. 82-66 United States District Court for the District of Columbia (May or June, 1967) 1, 8

Monroe v. Board of Commissioners City of Jackson, Tennessee, et al and *County Board of Education of Madison County, Tennessee, et. al.* Nos. 17118 and 17119, 6th Cir., (July 21, 1967) 2, 12

Singleton v. Jackson Municipal Separate School District, 348 F.2d 729 6

PAGE

Singleton v. Jackson Municipal Separate School District 355 F.2d 865 6

United States v. Jefferson County Board of Education 372 F.2d 836 (5th Cir. Panel 1966) referred to as Jefferson I 4, 6, 13

United States v. Jefferson County Board of Education March 29, 1967 (5th Cir. en banc 1967) referred to as Jefferson II 5, 6

ARTICLES CITED

The New Republic—Volume 157, No. 2, Issue 2745 July 8, 1967 11

No. 282

In the Supreme Court of the United States

OCTOBER TERM, 1967

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners,

v.

CLIFFORD EUGENE DAVIS, JR., ET AL.,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

EXPLANATORY STATEMENT

Although petitioners believe that our original petition for certiorari more than adequately indicates the necessity for granting certiorari, there have been three decisions, two from other Circuit Courts, one from a District Court, rendered since *Jefferson* which emphasize the great need for this Court to review the decision of the court below. The three decisions rendered since Jefferson are *Bowman v. County School Board of Charles City County, Virginia, et al.* No. 10793, 4th Circuit, (June 12, 1967); *Hobson v. Hansen and the Board of Education of the District of Columbia, et al.*, No. 82-66 decided in late

May or early June; and *Monroe v. Board of Commissioners, City of Jackson, Tennessee, et al.* and *County Board of Education, Madision County, Tennessee,* et al. Nos. 17118 & 17119, 6th Cir., (July 21, 1967).

However, opponents' brief in opposition contains certain statements to which we also feel some brief comment must be directed.

COMMENTS ON OPPONENTS' BRIEF IN OPPOSITION

The first portion of opponents' brief implies that petitioners have not submitted any argument in defense of the District Court desegregation plan in this case. This is not correct. We argued throughout our petition, particularly in Argument III beginning at Page 29, that each of the District Courts should be left free to formulate its own order or decree to fit the circumstances of each individual case before it. We reiterate that argument.

We recognize, however, that the District Court plan existing at the time this case was before the Fifth Circuit did not meet some of the requirements enunciated by the Court below although it did meet such requirements at the time the District Court issued its order. To that extent only, we recognize that our District Court plan must be modified.

Opponents, on the other hand, forget, or ignore, that the District Court plan in this case was approved July 15, 1965, two years ago. They also forget that this plan was a further modification of the plan approved in July of 1963. In fact, every time opponents

have requested a modification or up dating of our plan, their request has been granted by the District Court. Consequently, there is no doubt but that if opponents had filed a motion for further relief at any time after the present plan was approved in 1965, the District Court itself would have modified our present plan. Had the court below remanded with instructions to bring our plan in line with its pronouncements, there is no doubt that this would have been done and application for certiorari might not have been necessary. However, the oppressive and burdensome decree imposed by the court blow and its sweeping pronouncement of a radical change in constitutional requirements makes certiorari imperative.

Opponents also, at Page 12 of their brief, attempt to defend the different constitutional requirements established by the court below for states in this Circuit by adopting the same rationalizing as the court below. Opponents say, in referring to the charge of sectionalizing that "it is a truism if it merely describes the refusal of the court to decide issues presented in other parts of the country and *not present* on these records". (Emphasis added) We agree that the court "decided issues" not present on these records. Not one of these records contain any evidence as to a factual or legal difference between racial residential patterns in the states in this Circuit and the states in any other Circuit. And it is only by a conclusive finding of such difference that the statement of the court quoted by opponents can be justified.

(Opponents' brief, Page 12—Jefferson II, Page 5, Note 1).

Opponents' brief draws another conclusion to which comment must be directed. Pages 8 and 9 of opponents' brief contain these statements:

> "The main thrust of the petitions for certiorari —all the argument of bi-racial balancing, claims of conflicts of circuit, and protests that the special punishment is being visited on southern school boards—is the boards reaction to what they think *the opinion portends for the future.*" (emphasis added).
>
> "But the Court of Appeals' *promise for the future,* presents no litigable matter today." (emphasis added).

That petitioner is afraid of what the opinion portends for the future, is readily admitted. Look at what the court below says in *Jefferson I:*

> "The only school desegregation plan that meets constitutional standards is one that works." (Page 7)
>
> "The provision (HEW guidelines) referring to percentages is a general rule of thumb or objective administrative guide for measuring progress in desegregation. . . . (Page 94).
>
> "In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect fifteen

> to eighteen percent of the pupil population to have selected desegregated schools." (Page 95).
>
> "If Brown I left any doubt as to the affirmative duty of states to furnish a *fully integrated* education to Negroes as a class, Brown II resolved that doubt." (Pages 5, 6 & 7). (Emphasis added)

Jefferson II continues the promise for the future by saying:

> "The court holds that boards and officials administering public schools in this circuit have the *affirmative duty* under the Fourteenth Amendment *to bring about an integrated* unitary school system. . . ." (Page 5) (Emphasis added)
>
> "Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize." (Page 5)
>
> "To the extent that earlier decisions of this court . . . conflict with this view, the decisions are overruled. We refer specifically to the cases listed in footnote 2 of this opinion." (Page 6)

All of the above is now said in *Jefferson I* and *II* which is before this court on application for certiorari. Examination of prior decisions of the court below with respect to what "its opinion portends for the future" would seem to be in order.

Briggs v. Elliott, EDSC 1955, 132 Fed. Supp. 776, was decided by the Fourth Circuit in 1955, and was quoted with approval by the court below in at least ten cases during the ten year period from 1955 until 1965. The first criticism of that decision and its holding that:

> "The Constitution, in other words, does not require integration. It merely forbids segregation."

by the court below came in a single line footnote in *Singleton v. Jackson Municipal Separate School District*, 348 Fed. 2d 729, 730, Note 5. It was again criticized briefly in the second *Singleton* decision, 355 Fed. 2d. 865 in 1966 when it was referred to as an "oversimplified" construction of *Brown I*. It was next criticized in August, 1966, by the court below in *Davis v. Board of School Commissioners in Mobile County*, 364 Fed. 2d 896 in a brief footnote 1 as being "oversimplified dictum that the Constitution does not require integration". Yet, in December of 1966, the court below spends seven and one-half pages specifically overruling *Briggs* and its constitutional holding. (*Jefferson I*, Pages 39-47)

Thus, in less than two years, the court below has expanded a brief one line footnote criticism of one case and one constitutional principal into a ten page reversal of that case and principal and the absolute reversal of ten of its own decisions. See Jefferson II, Page 6, Footnote 3. If the court below can so expand a one line footnote criticism in two years should these boards not be afraid of what its many statements in this case, set forth above, "portend for the future"? Based upon the past history of the court below as "trail blazers" (Judge Coxe's dissent, Jefferson I, Page 150) the portent of the decision of the court below in this case can be no less than compulsory integration of students by forceably assigning them to

schools on some yet undetermined racial percentage basis, including forceable transporting from one end of the school system to the other and compulsory racial establishment of faculties also on some percentage basis. With this past history of the court below staring us in the face, does not the "court of appeals' promise for the future" present a "litigable matter" today? Must petitioners be relegated to the mere hope that this Court may, in some other case, in some other place, at some other time, review these constitutional issues and give us the relief that local public education needs? We respectfully pray not.

DISCUSSION OF DECISIONS SUBSEQUENT TO JEFFERSON

As mentioned in our opening statement, our primary reason for submitting this supplemental brief is the three decisions which have been rendered by other courts since *Jefferson*. The three decisions which have been rendered since *Jefferson*, one from the Fourth Circuit, one from the Sixth Circuit, and one by Circuit Judge Wright sitting by designation as the District Judge for the District of Columbia, have split so widely on their conception of Constitutional law that it is absolutely necessary that this Court grant our application for certiorari, review the issues involved, and undo the damage done by *Jefferson*.

The first decision in time since Jefferson is *Bowman v. County School Board of Charles City County, Virginia*, and its companion case. The majority opinion approved a freedom of choice plan and flatly rejected the future portent of *Jefferson* by specifically

rejecting the theory that plaintiffs were entitled to "compulsive assignments to achieve a greater intermixture of the races, notwithstanding their individual choices". *Bowman*, Page 1. Although this decision followed *Jefferson* to some degree it also further rejected *Jefferson* by remanding the case to the District Court for further hearings on the question of faculty desegregation with unfettered discretion, (as compared to *Jefferson*) left with the District Court, as was originally envisioned by *Brown II*, as to what decree or order he should fashion. The concurring opinion however, would appear to go much further in following *Jefferson* then did the majority. This is an example of one court using another court's decision as one more step in the ladder of building a new principal of law, (or body of social and political conduct), if that first decision is left to stand as though approved by this Court. Another, and far more significant, example of what the future portends if this court fails to review and reverse or modify *Jefferson*, is the decision in *Hobson v. Hanson* by the District Court of the District of Columbia. Although this is only a District Court decision, it is most important because it was decided by a member of a Circuit Court of Appeals. This decision does more damage to our system of law and to our system of local public education than any decision to date. To begin with, on the very first page of its decision, the Court establishes a new type of class which may bring a class action when it says,

> "The present litigation, brought in behalf of Negroes as well as *poor children generally* in the

district's public schools . . ." Hobson, Page 1. (Emphasis added)

This statement would be bad enough if it gave some definition of the class of "poor children". However, nowhere in the decision does the court ever define which persons would fit that one particular class. What are to be the criteria? May rich people or affluent people also bring a class action?

The court then proceeds into the field of education to abolish, among other things, the "track" system, socially homogeneous schools, and the neighborhood school system. It seems to make no difference whatsoever to the court that dedicated professional educators throughout this nation are still not agreed on the merits or demerits of the various types of "track" systems. Nor that most educators are convinced of the desirability of the neighborhood school system. Are judges and lawyers qualified by training or experience to substitute their judgment for that of professional educators or the people, generally, as to what is a good, better or best educational policy? The question would seem to be self answering.

Even the court itself admits, at page 179, that "the goal or objective toward which the school system should strive" is a ". . . more complex question". Admittedly, determining the best goals and objectives of an educational system is a most complex problem. *But, the issue that is here so critically important is not what the goals should be but who should make the decision.* Should not this be decided by the people through their elected school boards, state legislatures

and state departments of education through the utilization of the knowledge, training and experience of their *own* selected professional educators? It would even be preferable, both in law and in practice, to have these most important decisions made by Congress (although it is constitutionally doubtful that Congress has such authority) to having them made by the courts, even state courts.

The Court in *Hobson* finally admits the problem inherent in its decision in its "parting word" at page 180 wherein the Courts says:

> "It is regretable, of course, that in deciding this case, this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. . . ."

One may sympathize with the Court's desire to see our educational systems operated in a manner more suitable to the court's individual preference. However, the fact remains—a Court is a Court of law—not an administrative body—not a legislative body. The power and authority to decide what is good, better or best, educationally, for the people of this nation has never been tendered to the judiciary by the Constitution or by any act of Congress and this is as it should be. The people have elected representatives, school board members and legislators, as well as professional educators, qualified by training and experience, to assist them in deciding how their educational system should be operated and what its goals should

be. They have utilized this same, constitutionally correct, system to determine and resolve problems of old age security, public housing, fair labor standards, and other complex problems which "seem at times to defy . . . resolution" *Hobson*, page 180. This is the democratic way.

Although *Hobson* only affects the schools in the District of Columbia, it is important because it expresses the conclusion of an appellate court judge and because it relies heavily on the reasoning expressed in *Jefferson*. If *Jefferson* is an ancestor of *Hobson*, what will be its progeny?

The sum and substance of Judge Wright's decision in *Hobson* has been, perhaps, best stated by Alexander M. Bickel writing in *The New Republic*, Vol. 157, No. 2, Issue 2745, July 8, 1967 when he said:

> "What then is the use of such judgment? what is the use of a hortatory constitutional pronouncement urging Washington, D.C., to solve its social and economic problems? *Judge Wright's opinion might have been a document issued by some group of civic leaders, or some foundation or research organization, and whatever disagreement one might have had with this or that aspect of it, one would have welcomed its attention to the school problem.* But the Constitution and the judges who guard it have a well-defined role to play, which no one else can play. They are to address themselves to those features of the society with which law can deal, by defining rights, obligations and goals. No charitable organization and no study group can do that job, can invoke the power of

> government to those ends. It is no service to any worthy cause to saddle legal institutions with functions they cannot discharge, and to issue in the name of the law promises the courts cannot redeem." (emphasis added)

This is the danger of *Jefferson*. What Judge Wright has already done for Washington, D. C., *Jefferson* implies for the future for all school systems in the Fifth Circuit. This school board is entitled to know *now*, what the future holds in the way of court decreed educational policy. This Court must return the operation of our educational systems to the people and *their* professional educators.

The third case rendered since *Jefferson* and which again points up the split between the various circuits, as indicated in our original petition, is the case of *Monroe v. Board of Commissioners, City of Jackson, Tennessee, and the County Board of Education, Madison County, Tennessee*, decided July 21, 1967, by the Sixth Circuit. This case points up the absolute necessity for this court to review these issues and resolve these differences between the various Circuit Courts.

The *Monroe* case deals squarely with the question of "de facto" segregation as opposed to "de Jure" segregation, the distinction between the two, and the different rule of law imposed for the two by the court below.

The court discusses at length its decision in *Deal v. Cincinnati Board of Education*, 369 Fed. 2d 55 (CA 6, 1966), petition for cert filed, 35 LW 3394 (US

May 5, 1967) (1358) which dealt with a school system which had "de facto" segregation, a school system which had not had legal segregation at the time of the *Brown* decision. It noted also that in the instant case, Jackson, Tenn. and Madison County, Tenn. had not desegregated until after the *Brown* decision just as had the school board involved in this petition. The court then said:

> "We are at once aware that we were there dealing with the Cincinnati schools which had been desegregated long before *Brown*, whereas we consider here Tennessee schools desegregated only after and in obedience to *Brown*. *We are not persuaded, however, that we should devise a mathematical rule that will impose a different and more stringent duty upon states, which, prior to Brown, maintained a de jure bi-racial school system, than upon those in which the racial imbalance in its schools has come about from so called de facto segregation—this to be true even though the current problem be the same in each state.*" (Emphasis added)

The court then says:

> "We are asked to follow *United States v. Jefferson County Board of Education*, 372 Fed. 2d 836 (CA 5, 1966). . . ."

and then at page 4:

> "But to the extent the *United States v. Jefferson County Board of Education*, and the decisions reviewed therein, are factually analogous and express a rule of law contrary to our view herein and in *Deal*, we respectfully decline to follow them".

In discussing this disparate rule of law between states, the Sixth Circuit also said:

> "However ugly and evil the bi-racial school systems appear in contemporary thinking, they were, as *Jefferson*, supra, concedes, de jure and were once found lawful in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by *Brown* would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the Legislatures of the states and the Nation—U.S. Constitution, Article 1, Section 9, Clause 3 and Section 10, Clause 1. Neither, in our view, would such decrees comport with our current views of equal treatment before the law."

This is a clear conflict between circuits. This decision and the decision of the court below, together, mean that the Fourteenth Amendment means one thing in Madison County, Tennessee, but something entirely different in East Baton Rouge Parish, Louisiana. This difference should be resolved by this Court.

Although the Sixth Circuit in this case does indicate some necessity for faculty desegregation, it must be noted that the requirements it places on school boards in Tennessee is far, far different from those imposed by the court below on school boards in Louisiana. Even though it had the decision of the court below before it with its specific requirements as to faculty desegregation, and even though it acknowledged that this Court's decision in *Bradley v. School Board*, 382 U.S. 103 (1965) probably implied some

requirements as to faculty desegregation, it specifically refused to adopt the stringent requirements imposed by the Fifth Circuit in *Jefferson* and, furthermore, left the District Court with the discretion given it by law in fashioning appropriate orders and decrees for cases before it.

We respectfully submit that in view of its incorrect interpretation of Fourteenth Amendment requirements, the great budren it places upon local public education systems by its oppressive decree, and its conflict with the law as declared by other Circuit Courts of Appeal, both before and after its birth, the decision of the court below must be reviewed by this court and our application for certiorari should be granted.

Respectfully submitted,

JOHN F. WARD, JR.,
Counsel For Petitioner.

CERTIFICATE OF SERVICE

I, John F. Ward, Jr., attorney for petitioner and a member of the Bar of the United States Supreme Court, do hereby certify that on this 21st day of September, 1967, I served copies of the foregoing Supplemental Brief In Support of Petition for Certiorari on all attorneys for respondents by mailing same, postage prepaid, to their respective offices as shown below:

1. Jack Greenberg, Norman Amaker & James M. Nabrit, III, 10 Columbus Circle, New York, New York 10019
2. A. P. Tureaud, 1821 Orleans Avenue, New Orleans 16, Louisiana
3. Johnnie Jones, 530 South 13 Street, Baton Rouge 2, Louisiana

JOHN F. WARD, JR.,
Attorney for Petitioner.

B-1087, 9-67